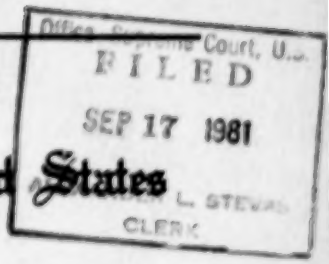
No. 81-308



In The

Supreme Court of the United States

October Term, 1981

LEON ROSEN,

Respondent,

vs.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL PENSION FUND,

Petitioner,

and

VICTOR P. CIVATTE,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STANLEY LEBOFSKY
WEINSTEIN, LEONARD & LEBOFSKY ASSOCIATES
Attorneys for Respondent
2401 Pennsylvania Avenue
Philadelphia, Pennsylvania 19130
(215) 763-5100

5604 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

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STATEMENT OF THE CASE

This is an action in equity to compel payment of a pension in the sum of $48 per month. Respondent Leon Rosen was a member of "Hotel and Restaurant Employees and Bartenders Union of Philadelphia, Bucks, Montgomery and Delaware Counties, Pennsylvania, Local 274 AFL-CIO", the successor to the "Chefs, Cooks, Pastry Cooks and Assistants Union, Local 111." The pension plan was originally formed by Local 111 in October 1967 and provided benefits to members with at least fifteen (15) years of credited service and who attained age sixty-two (62). Credit was given for prior years of service between January 1958, when the Union was formed, and the plan's establishment in October 1967. In 1975 the plan merged with petitioner Hotel and Restaurant Employees and Bartenders International Union Fund (hereinafter referred to as "the Fund"). Petitioner Victor P. Civatte was a trustee of the Local 111 Pension Fund during the period of time around which this litigation arises.

Inasmuch as respondent was given credit for the period from January 1, 1958 until October 1967, we are only concerned with whether respondent should receive credit for the period from October 1967 until September 1973. If so, he would then satisfy the requirement of having attained fifteen (15) years credit service.

Respondent was employed by the Walnut House Restaurant, owned by his sister and brother-in-law, Mr. and Mrs. Specter from 1957 to 1967. In 1967, the year in which the plan was formed, the business was sold to Herman Kane who in turn sold it to a Mr. Gonzalez in 1971. Mr. Rosen was continuously employed at this location from 1957 to 1974. He was a dues-paying member of the Union from 1958, when the Union was formed, until 1976 when he applied for his pension.

Respondent elected to retire in 1976 and believing himself to be eligible for his pension upon his 62nd birthday on June 24, 1976, he applied for his pension.

The Fund, by letter dated May 18, 1976, informed respondent that although he had attained fifteen (15) years of completed service, he was not eligible to apply at that time because he had still not reached age 62. He then re-applied in June, following his 62nd birthday and was informed by the Fund, for the first time, that he was ineligible for his pension because his employer for the period 1967-1971 had failed to make required contributions on his behalf.

It is agreed that respondent's employer during this period failed to make the required contributions. In fact, in 1971, petitioner Civatte, for the first time, informed respondent of this fact and further informed him that in order to cure this defect and protect his eligibility respondent would have to personally pay the sum of $419.20 representing contributions of approximately $10 per month. Based upon Civatte's representations, respondent paid the $419.20 which was accepted by the local plan and later transferred to and accepted by the Fund. Following this payment there was no further contacts between respondent and petitioners or the Union regarding respondent's pension eligibility and respondent was not aware of any problems until 1976. The trustees and other union representatives had been aware all along that no contributions had been made on respondent's behalf for the period 1967-1971 but never sought to take positive action to compel payments. Civatte testified that picketing was considered but was rejected because of respondent's family relationship to the owners even though Rosen himself was not consulted. Inasmuch as respondent's brother-in-law and sister sold the business in 1967 there was no family relationship existing during that time period. In fact, petitioners offered no evidence of any type of

action taken during this 1967-1971 period to collect the contributions other than requests to the employer to make the payments. Furthermore, there was no evidence that respondent was even made aware of the deficiency until 1971 when he was so informed by Mr. Civatte. Despite their acceptance of respondent's payment, petitioner the Fund, rejected his eligibility for a pension because of the lack of employer contributions during this four (4) year period. The district court did not feel it necessary to determine whether respondent should be given credit for service for this period. The court concluded that since respondent failed to present proof of contributions for the period subsequent to November 1971 he had failed to establish fifteen (15) years of credited service regardless of the status of the 1967-1971 period (respondent's attaining fifteen years occurred in 1973). It was only during trial that any question of post-1971 contributions arose. Neither respondent nor the Union, a petitioner, had ever theretofore raised the question of non-contribution subsequent to 1971. All pleadings, motions, responses, answers, and correspondence referred to the 1967-1971 period. The trial court's burden to respondent to present evidence of payment for the post-1971 period, years after the fact, was obviously impossible and subsequent to trial the court permitted petitioners to file amended pleadings in order to raise the defense.

The district judge also determined that the trustees of the plan owed a fiduciary duty to respondent but concluded that despite their inaction they had met and fulfilled that duty because they asked the employer to make up the deficiency and discussed the matter with counsel.

The Third Circuit Court of Appeals reversed the district court with respect to petitioners herein based upon the failure of the Fund and its trustees to fulfill their fiduciary obligations to respondent. They held that some type of affirmative action must

be undertaken to collect contributions before a trustee can be considered to have carried out his fiduciary duties and further held that a beneficiary must be informed of his employer's failure to make contributions.

The Court of Appeals further found that the Fund was estopped from asserting the lack of contributions for the 1967-1971 period. However, it is submitted that the Court of Appeals' finding as to the breach of fiduciary duty would apply to the entire 1967-1973 period and render moot any question of estoppel.

REASONS FOR DENYING THE WRIT

Petitioners urge a review of the Court of Appeals' holding that the trustees of the Fund were obligated to take some affirmative action in order to attempt to collect pension contributions from respondent's employer. Petitioners argue that the court is limited to a determination of whether a trustee's action is "arbitrary and capricious." Though the Court of Appeals concluded that the Fund's denial of benefits was arbitrary and capricious, it based such finding not on the Fund's eventual determination that respondent was not eligible under the terms of the plan itself, but upon the trustee's prior failures to fulfill their fiduciary duties to respondent. The Fund's denial of benefits was not arbitrary and capricious because they improperly determined that respondent was not eligible according to the terms of the plan itself but because it was the inaction of the trustees which caused and led to the technical ineligibility. The Court of Appeals recognized this when in discussing the "arbitrary and capricious" standard it stated:

> "Although this is a limited standard of review it leads neither to abdication of traditional judicial control of fiduciaries nor to excessive judicial

> intervention in trust operations, in harmony with federal labor policy." [citing *Rehmar v. Smith*, 555 F. 2d 1362, 1371 (9th Cir. 1976) Appendix B 22a].

Petitioners contend that a trustee has no obligation to take action against a non-contributing employer in order to secure a worker's pension and that trustees fulfilled their obligations to respondent in unilaterally deciding *not* to attempt to collect the contributions. The Court of Appeals held that some action must be taken. It is conceivable that a letter threatening legal action would have sufficed. Petitioners argue that a lawsuit to enforce collection was impractical in that the costs of suit would far outweigh the benefit to be gained (Petition, p. 8). No statement by respondent could more clearly indicate the attitude of petitioners in determining in whose interest they acted. The "outweighed" benefit is respondent's very modest pension of $48 per month. The fact that Rosen was a dues-paying union member since the union's inception was ignored. The fact that he worked in the industry for a major portion of his life was ignored. The fact that the contribution was measured in pennies a day was ignored. A lawsuit was shunned because the cost outweighed the benefit. The filing fee in Philadelphia in 1967 to institute suit for such an amount was about $14. In all probability the institution of the suit alone would have resulted in payment. Petitioners claim that such action could force the employer out of business, yet there were no facts presented to support such a claim. It is unbelievable that an obligation of $2 per week would force the employer out of business, particularly one with three employees and which was readily saleable. The Fund retained an attorney and it is probable that some minimum action would have resulted in payment by the employer, yet nothing was done.

Petitioners object to a finding which places upon them a burden to protect the interests of their members. They are

unable to present a single positive action they undertook to protect Leon Rosen. Petitioners' lack of regard for respondent's interest is further highlighted by the fact that it was only after four years of not collecting contributions that they even informed Leon Rosen and attempted to cure the problem. Then they permitted the same history of non-collection to thereafter exist. Petitioners argue that Rosen was then aware of the situation so he knew he was ineligible for a pension. Yet what did Leon Rosen know and what could he do. It was not up to him to make collections. He was a restaurant worker, seemingly covered by a pension plan negotiated on his behalf. His representatives were aware of prior problems and he had every reason to expect that they would not let the problems arise again. Yet the Fund would place proper administration of the plan upon Rosen. In fact when he applied for his pension he was initially told that he was eligible. Later the Fund reversed their position based upon their conclusion that they should not have accepted Rosen's payment for the 1967-1971 period. They never raised any question of lack of payment for the period from 1971 to 1973. Even after suit was instituted on respondent's behalf, there was never any defense raised regarding a lack of contributions for years after 1971. Only during trial was the issue raised and the impossible burden placed upon Rosen to prove that payments had been made in his behalf for the 1971-1973 period. Subsequent to trial the court permitted petitioners to amend their pleadings to enter this defense. It is revealing that petitioners were unable to even produce complete records concerning respondent's account yet Rosen was given the burden of proving that the Fund received payment.

The Court of Appeals concluded that the Fund's acceptance of Rosen's voluntary payment in 1971 estopped them from asserting a defense of non-payment for the period of 1967-1971. *Scheuer v. Central States Pension Fund*, 358 F. Supp. 1332 (E.D. Wis. 1975), *on rehearing*, 394 F. Supp. 193 (E.D. Wis. 1975), *aff'd*, 570 F. 2d 347 (7th Cir. 1977).

The question of estoppel becomes a moot point in light of the Court of Appeals' conclusion that the trustees failed to carry out their fiduciary duty. If such is the case the voluntary payment by Rosen is of no significance. Petitioners seem to recognize that the trustees had some obligation to protect Rosen but contend that they fulfilled that obligation. They feel that since the matter was discussed with counsel and a decision made not to attempt collection, they have therefore fulfilled their obligations. The Court of Appeals' conclusion that "some action" was required by the trustees is nothing more than a declaration of what has always been the standard applied to fiduciaries. A trustee cannot sit back, after failing to protect a beneficiary's interest, and absolve himself of responsibility by his declaration that he decided that affirmative action was too burdensome when weighed against the benefit to be derived by such action. This is not as complex and substantial a burden as petitioners would have the Court believe.

Petitioners voice concern regarding the effect of the Court of Appeals' decision on the actuarial soundness of pension funds. Obviously, if trustees properly fulfill their duties the actuarial soundness of pensions will not be affected. If a member's employer fails to make his required contributions and the trustee has made an effort to collect same, then the Fund will not be exposed to liability to non-eligible members. At the very least, the Court of Appeals' decision will no longer permit a worker to spend his years in the labor market without at least being made aware of his pension status. The protection of the employee is of paramount importance and the Court of Appeals sought only to insure that protection.

Petitioners feel that this Court should issue a writ of certiorari because of conflict of decisions between the circuit courts.

In *Scheuer v. Central States Pension Fund, supra,* the Seventh Circuit Court of Appeals affirmed, without opinion, the district court's finding that equitable estoppel may be a basis for relief in actions by employees to receive pension benefits.

In *Thurber v. Western Conference of Teamsters Pension Plan et al.,* 542 F. 2d 1106 (1976) and in *Aitken v. I.P. & G.C.U. Employer Retirement Fund,* 604 F. 2d 1261 (9th Cir. 1979) the Ninth Circuit Court of Appeals refused to apply the doctrine of equitable estoppel since to do so would be to compel an illegal act.

However, there is a fundamental difference between *Thurber* and *Aitken* on the one hand and *Scheuer* and the instant case on the other.

In *Thurber* a payment was made 11 years after an employee had a "break in service" in order that the employee would be made eligible for early retirement. The break in service was an actual break in service where the employee was in fact not employed and even if contributions had been made during the break he would not be eligible. Similarly, in *Aitken,* the claimant was ineligible for a pension because he had become a sole proprietor. In both cases the court specifically found that the granting of a pension would be illegal even though the requisite funds had been paid and even if they had been paid during the period of the break in service. Based upon the otherwise ineligibility of claimants the court refused to invoke estoppel to compel an illegal act.

In *Scheuer* however, the employee's break in service was not an actual break but one that arose because of a technical change of his employment status. Claimant was a hauler for his employer and owned his own tractor. The employer then hired a private delivery company to do its hauling. At the direction of

the delivery company claimant leased his tractor to the delivery company and claimant had the right to employ the driver who in fact was himself. The delivery company made no contributions even though claimant continued to work as before. Thereafter, based upon a union representative's promise that he would be eligible for a pension if the contributions were made the employee arranged to pay the funds to his employer who made the required contribution to the plan. The court, in applying the doctrine of estoppel found that based upon these facts concerning status as an employee, the trustees could have found him eligible had the contributions been made all along. As in the present case the claimant's eligibility based on years of service was not at issue — only the question of contributions having been retroactively made. Unlike *Thurber* and *Aitken* there was no specific finding that a decision to grant the pension would be illegal.

A retroactive contribution cannot be applied to impose eligibility on one otherwise ineligible for a pension. However, where the employee is otherwise eligible for his pension and a plan accepts the late contribution with a promise of eligibility they are then estopped from denying that eligibility. In such cases the estoppel is not invoked to compel an illegal act. The *Scheuer* decision, as in the present case, found the elements of estoppel to be present based upon the promise of eligibility. There is no illegality with which to be concerned in the instant case inasmuch as Rosen's eligibility was admitted except for the voluntary payment.

Additionally, respondent is hard-pressed to understand the Fund's reluctance to give credit for this voluntary payment. The Fund is obviously concerned with the actuarial stability of its plan yet maintains that an employee contribution is improper. It certainly seems reasonable to assume that the plan would embrace a system whereby the employee of a non-contributing

employer would keep the payments current. In such manner the plan would be better assured of its financial stability unless they are more desirous of avoiding payments rather than making them. One cannot help wonder of the plan's position had Rosen given the funds to his employer as in *Scheuer*, who would then make the payments. The Fund accepted the payment and years later took the position that Rosen was not eligible and at all thereafter times worked to defeat the rights of one of its members. Such course of conduct, in rejecting one's eligibility for a $48 per month pension is entirely in opposition to the main purpose of the plan — that of providing a benefit to its members.

CONCLUSION

The Court of Appeals, in directing that pension plan trustees take action to protect the rights of covered employees, has merely restated the duties which fiduciaries have historically been required to fulfill. The simple fulfillment of these duties will not impose an unreasonable burden on trustees of employee benefit plans nor deprive them of their exercise of discretion in protecting their beneficiaries. An adherence to their duties can only lead to increased efficiency in the administration of plans and increased protection for those workers for whom they purport to act.

The question of estoppel in this particular case is secondary to these responsibilities for if the trustees failed to act properly the failure existed from the inception of the plan until respondent's retirement.

There is no conflict of decisions among the circuits, which have properly ruled that estoppel cannot be invoked to compel an illegal act but can be invoked to compel an act that is not found to be illegal.

WHEREFORE, respondent respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

STANLEY LEBOFSKY

WEINSTEIN, LEONARD &
LEBOFSKY ASSOCIATES
Attorneys for Respondent